

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ROBERT SCHNUERINGER,

Case No. 3:19-cv-00353-MMD-WGC

Petitioner,

## ORDER

PERRY RUSSELL, *et al.*,

## Respondents.

## I. INTRODUCTION

This is a habeas corpus proceeding under 28 U.S.C. § 2254. Respondents have filed a motion to dismiss (“Motion”) (ECF No. 10) in response to Petitioner’s petition for writ of habeas corpus (“Petition”) (ECF No. 6).<sup>1</sup> Respondents argue that most of Petitioner’s claims must be dismissed because they are either not cognizable in a federal habeas proceeding or they have not been exhausted in state court. Respondents also argue that some of Petitioner’s claims should be dismissed as conclusory. For reasons that follow, the Motion will be granted in part and denied in part.

## **II. BACKGROUND**

On December 12, 2012, following a jury trial in Nevada's Second Judicial District Court, in Washoe County, Petitioner was found guilty of murder in the second degree. (ECF No. 12-14.) He was sentenced to life in prison with parole eligibility after serving a minimum of 10 years. (ECF No. 12-19.) Petitioner appealed, and the Nevada Supreme Court affirmed the judgment on February 27, 2014. (ECF No. 13-15.)

On February 10, 2015, Petitioner filed a petition for a writ of habeas corpus in the

<sup>1</sup>The Court has reviewed Petitioner's response (ECF No. 15) and Respondents' reply (ECF No. 17).

1 state district court. (ECF No. 13-18.) With the assistance of court-appointed counsel,  
2 Petitioner filed a supplemental petition. (ECF No. 13-36.) After holding an evidentiary  
3 hearing in February 2018, the court denied habeas relief. (ECF Nos. 14-17, 14-18.)  
4 Petitioner appealed. (ECF No. 14-21.) On May 15, 2015, the Nevada Court of Appeals  
5 entered an order affirming the lower court's decision. (ECF No. 14-38.)

6 Petitioner initiated this federal habeas proceeding by mailing his Petition to this  
7 Court on June 20, 2019. (ECF No. 6.) On November 15, 2019, Respondents filed the  
8 Motion now before the Court for decision. (ECF No. 10.)

9 **III. DISCUSSION**

10 **A. Cognizability**

11 Respondents argue that all but one of Petitioner's claims in Grounds 1 and 4 of his  
12 Petition are not cognizable in a federal habeas proceeding. (ECF No. 10 at 5-6, 10.)

13 A petition for a writ of habeas corpus is only available if a person is being held in  
14 custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C.  
15 § 2254(a). A federal writ of habeas corpus is not available with respect to claims based  
16 solely on alleged errors in the interpretation or application of state law. *Wilson v. Corcoran*,  
17 562 U.S. 1, 5 (2010). To obtain habeas relief, a petitioner must demonstrate a  
18 transgression of federal law binding on the state courts. *Id.* Thus, if the petitioner's claim  
19 is premised merely on an alleged misapplication of state law, he fails to state a cognizable  
20 claim for federal habeas relief. See *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

21 In Ground 1, Petitioner presents, verbatim, the seven arguments he presented to  
22 the Nevada Supreme Court in his direct appeal. (ECF No. 6 at 11-30; ECF No. 13-7 at 17-  
23 37.) His claim that the evidence presented was not sufficient to sustain a conviction of  
24 second-degree murder is based on an alleged violation of the Due Process Clause as  
25 recognized in *Jackson v. Virginia*, 443 U.S. 307 (1979). (ECF No. 6 at 11-17.) He also  
26 alleges a violation of his rights under the Sixth Amendment with respect to unsworn victim  
27 impact testimony given by the victim's aunt. (*Id.* at 27-29.) His remaining five claims are,  
28 however, premised entirely on alleged violations of state law. (*Id.* at 17-27, 29-30.) Thus,

1 the latter claims will be dismissed as not cognizable in a federal habeas proceeding.

2 In Ground 4, Petitioner alleges that he “reserve[s] the right to set forth additional  
3 claims of ineffectiveness of trial and/or appellate counsel.” (*Id.* at 77.) For obvious reasons.  
4 this does not constitute an independent ground upon which federal habeas relief may be  
5 granted. Thus, it will also be dismissed as not cognizable.

6 **B. Exhaustion**

7 Respondents argue that Petitioner has failed to exhaust state court remedies for  
8 portions of Grounds 2 and all of Ground 3.

9 **1. Standards**

10 A federal court will not grant a state prisoner's petition for habeas relief until the  
11 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*,  
12 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair  
13 opportunity to act on each of his claims before he presents those claims in a federal  
14 habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). A claim remains  
15 unexhausted until the petitioner has given the highest available state court the opportunity  
16 to consider the claim through direct appeal or state collateral review proceedings. See  
17 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374,  
18 376 (9th Cir.1981).

19 A habeas petitioner must “present the state courts with the same claim he urges  
20 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). To achieve  
21 exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting  
22 claims under the United States Constitution” and given the opportunity to correct alleged  
23 violations of the prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see  
24 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

25 A claim is not exhausted unless the petitioner has presented to the state court the  
26 same operative facts and legal theory upon which his federal habeas claim is based. *Bland*  
27 *v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion  
28 requirement is not met when the petitioner presents to the federal court facts or evidence

1 which place the claim in a significantly different posture than it was in the state courts, or  
 2 where different facts are presented at the federal level to support the same theory. See  
 3 *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). On the other hand, new allegations  
 4 that do not “fundamentally alter the legal claim already considered by the state courts” will  
 5 not render a claim unexhausted. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); see also  
 6 *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994).

## 7           **2. Analysis**

8           Grounds 2 and 3 of Petitioner’s Petition present claims of ineffective assistance of  
 9 counsel (“IAC”).

10          In Ground 2.1, Petitioner alleges that counsel was ineffective by failing to obtain a  
 11 severance of his trial from the trial of his co-defendants. (ECF No. 6 at 32-44.)  
 12 Respondents argue that this claim is exhausted only with respect to the portion that alleges  
 13 severance was warranted because the co-defendants’ defenses were mutually  
 14 antagonistic. (ECF No. 10 at 6.) Respondents are correct. Petitioner’s opening brief on  
 15 appeal in his state habeas proceeding was premised only on that theory. (ECF No. 14-31  
 16 at 21-22.) Thus, Petitioner’s additional allegations that his counsel’s representation  
 17 involved a conflict of interest and that counsel’s purported joint defense agreement with  
 18 the other defendants prevented Petitioner from accepting favorable plea offers are  
 19 unexhausted.<sup>2</sup>

20          In Ground 2.2, Petitioner alleges that counsel was ineffective by failing to retain  
 21 forensic experts to assist in determining the cause and manner of death. (ECF No. 6 at  
 22 44-47.) The claim is premised on assertions that the State’s experts’ findings on these  
 23 points conflicted with eye-witness testimony and that Petitioner’s counsel was unprepared

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25          2The Court does not agree, however, that only the six paragraphs cited by  
 26 Respondents are exhausted. (See ECF No. 10 at 6.) The claim includes several additional  
 27 allegations that are relevant to Petitioner’s claim faulting counsel for not seeking a  
 28 severance due to mutually antagonistic defenses. Those allegations may properly be  
 considered by the Court to the extent they do not fundamentally alter the exhausted claim.  
 See generally *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (en banc) (discussing  
 whether new factual allegations render a claim unexhausted).

1 at trial to respond to the testimony of the State's experts. (*Id.*) Respondents argue that the  
2 entire claim is unexhausted. (ECF No. 10 at 6-7.)

3 In his opening brief on appeal in his state habeas proceeding, Petitioner presented  
4 a claim that counsel was ineffective for failing to call a pathologist at trial. (ECF No. 14-31  
5 at 17-18.) He alleged that counsel had retained a pathologist, Dr. Haddix. (*Id.*) He further  
6 alleged that counsel chose not to call her because he believed, erroneously, that her  
7 findings were unfavorable to the defense, when, in fact, they could have been exculpatory  
8 if used in conjunction with testimony of another witness, Nathaniel Smith. (*Id.*) Ground 2.2  
9 makes only brief reference to counsel's alleged failures in this regard and fails to allege  
10 any specific facts. (ECF No. 6 at 46.)

11 Thus, while similar, the claim presented to the state court is fundamentally different  
12 than claim presented to this Court. Ground 2.2. is unexhausted.

13 In Ground 2.3, Petitioner alleges that counsel was ineffective by failing to  
14 investigate and prepare for trial. (*Id.* at 47-48.) This claim is based on allegations that  
15 counsel failed to interview witnesses and failed to investigate evidence that the State may  
16 have exerted improper influence on witnesses, including payment. (*Id.*) Petitioner has not  
17 fairly presented this claim to the highest available state court. Ground 2.3 is unexhausted.

18 In Ground 2.4, Petitioner alleges that counsel was ineffective by failing to present  
19 a defense. (*Id.* at 48-50.) In support of this claim, Petitioner cites to counsel's opening  
20 argument, given after the State had presented its case-in-chief, in which counsel told the  
21 jury to refer to the testimony of three of the State's witnesses, which was unfavorable to  
22 Petitioner's defense. (*Id.*) He also cites instances in which counsel failed to object to  
23 prejudicial testimony. (*Id.*) Petitioner has not fairly presented this claim to the highest  
24 available state court. Ground 2.4 is unexhausted.

25 In Ground 2.6, Petitioner alleges that he was deprived of effective assistance of  
26 appellate counsel due to counsel's failure to raise various issues on direct appeal. (*Id.* at  
27 52-57.) Petitioner has not fairly presented this claim to the highest available state court.  
28 Ground 2.6 is unexhausted.

1           Grounds 2.7 and 2.8 allege violations of Petitioner's constitutional rights due to the  
2 cumulative effect of trial counsel's and appellate counsel's errors, respectively. (*Id.* at 57-  
3 58.) Neither claim was fairly presented to the highest available state court. Both are  
4 unexhausted.

5           In Ground 3.1, Petitioner alleges that counsel was ineffective by failing to present  
6 Petitioner's theory of the case, which contradicted the State's theory and should have  
7 been presented through the testimony of Petitioner and his supporting witnesses. (*Id.* at  
8 68-71.) Much of the claim is based on testimony that Petitioner would have been able to  
9 provide, had he been called, and only briefly refers to other witnesses. (*Id.*)

10          In his opening brief on appeal in his state habeas proceeding, Petitioner presented  
11 a claim that counsel was ineffective for failing to call Nathaniel Smith as a witness at trial.  
12 (ECF No. 14-31 at 14-16.) Ground 3.1 makes only a passing reference to Smith and does  
13 not specify what testimony he would have been able to provide. Thus, the claims are only  
14 tangentially similar. Because it has not otherwise been presented to Nevada's highest  
15 available court, Ground 3.1 is unexhausted.

16          In Ground 3.2, Petitioner alleges that counsel was ineffective by failing to  
17 investigate his client's exposure to open murder, which led to a conviction for second-  
18 degree murder. (ECF No. 6 at 71-73.) He claims such failure resulted in counsel providing  
19 poor advice about a joint defense strategy and rejecting favorable plea offers. (*Id.*)  
20 Petitioner has not fairly presented this claim to the highest available state court. Ground  
21 3.2 is unexhausted.

22          In Ground 3.3, Petitioner alleges that counsel was ineffective by failing to present  
23 available mitigating evidence to support an argument for a lesser sentence. (*Id.* at 73-75.)  
24 In support of the claim, he identifies several friends and family members counsel should  
25 have called to testify on his behalf and gives a brief description of the testimony they could  
26 have provided. (*Id.*)

27          In his opening brief on appeal in his state habeas proceeding, Petitioner presented  
28 essentially the same claim but identified only two potential witnesses counsel should have

1 called—Catherine Barber and Kelly Cruz. (ECF No. 14-31 at 16-17.) Respondents argue  
 2 that Ground 3.3 is unexhausted as to all allegations relating to other witnesses. (ECF No.  
 3 10 at 9-10.) The Court disagrees with Respondents.

4 In addition to presenting the testimony of Barber and Cruz, Petitioner also  
 5 presented the testimony of his aunt, Marlene Bjorson, at his post-conviction evidentiary  
 6 hearing in the state district court. (ECF No. 14-17.) The Nevada Court of Appeals  
 7 considered testimony presented at that hearing in deciding Petitioner's IAC claim based  
 8 on counsel's failure to present mitigating evidence. (ECF No. 14-38 at 5-6.) Additional  
 9 allegations included with Ground 3.3. do not fundamentally alter the claim considered by  
 10 the Nevada courts. Thus, Ground 3.3. is exhausted.

### 11           **3. Treatment of unexhausted claims**

12           Federal courts may not adjudicate mixed habeas petitions, that is, those containing  
 13 both exhausted and unexhausted claims. *Rose*, 455 U.S. at 518-19. However, a petitioner  
 14 who files a mixed petition must, at a minimum, be offered leave to amend the petition to  
 15 delete any unexhausted claims and to proceed on the exhausted claims. See, e.g.,  
 16 *Jefferson v. Budge*, 419 F.3d 1013, 1016-17 (9th Cir. 2005) (reversing and remanding the  
 17 dismissal of a mixed habeas petition because the district court failed to offer the petitioner  
 18 the opportunity to amend his petition to abandon the unexhausted claims).

19           Alternatively, the Supreme Court has held that “a federal district court has discretion  
 20 to stay [a] mixed petition to allow the petitioner to present his unexhausted claims to the  
 21 state court in the first instance, and then to return to federal court for review of his perfected  
 22 petition.” *Rhines v. Weber*, 544 U.S. 269, 271-72 (2005). This discretion is to be exercised  
 23 under “limited circumstances,” *Id.* at 277, because “routinely granting stays would  
 24 undermine the AEDPA’s goals of encouraging finality and streamlining federal habeas  
 25 proceedings.” *Blake v. Baker*, 745 F.3d 977, 981-82 (9th Cir. 2014).

26           The stay-and-abeyance procedure is appropriate only where the habeas petitioner  
 27 has shown: (1) “good cause” for the failure to exhaust, (2) the unexhausted claim is  
 28 “potentially meritorious,” and (3) the petitioner did not “engage[ ] in intentionally dilatory

1 litigation tactics.” *Rhines*, 544 U.S. at 278. “[G]ood cause turns on whether the petitioner  
 2 can set forth a reasonable excuse, supported by sufficient evidence, to justify” the failure  
 3 to exhaust the claim in state court. *Blake*, 745 F.3d at 982. However, “even if a petitioner  
 4 had good cause for that failure, the district court would abuse its discretion if it were to  
 5 grant him a stay when his unexhausted claims are plainly meritless.” *Rhines*, 544 U.S. at  
 6 277.

7 In light of the foregoing, the Court will provide Petitioner the opportunity to either  
 8 (1) abandon his unexhausted claims and proceed on his remaining claims, (2) voluntarily  
 9 dismiss his federal petition in order to return to state court to exhaust his unexhausted  
 10 claims, or (3) file a motion for a stay and abeyance.

### 11 C. Pleading Sufficiency

12 Respondents argue that several of Petitioner’s claims should be dismissed as  
 13 conclusory. In a habeas proceeding, notice pleading is insufficient as a habeas petition  
 14 must state facts that point to a real possibility of constitutional error. Rule 4, Rules  
 15 Governing § 2254 Cases (Advisory Note, 1976 Adoption); *O’Bremski v. Maass*, 915 F.2d  
 16 418, 420 (9th Cir. 1990). Mere conclusions of violations of federal rights without specific  
 17 supporting allegations do not state a basis for habeas corpus relief. *Mayle v. Felix*, 545  
 18 U.S. 644, 649 (2005); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995). Conclusory  
 19 allegations not supported by facts are subject to dismissal. *Blackledge v. Allison*, 431 U.S.  
 20 63, 74 (1977).

21 Grounds 2.1, 2.2, 2.3, 2.4, 3.1, and 3.3 are the claims Respondents identify as  
 22 either partially or wholly conclusory. (ECF No. 10 at 6-7, 8-10.) While the Court agrees  
 23 that many of the allegations included within these grounds lack specificity or are irrelevant  
 24 to the gravamen of the alleged constitutional violation asserted, each ground alleges facts  
 25 that at least point to the possibility of constitutional error. Thus, the Court declines to  
 26 dismiss any of Petitioner’s claims for failing to meet habeas pleading standards.

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1       **IV. CONCLUSION**

2           It is therefore ordered that Respondents' motion to dismiss (ECF No. 10) is granted  
 3 in part and denied in part. All claims in Ground 1 except for the Due Process Clause claim  
 4 and the Sixth Amendment claim are dismissed as not cognizable in a federal habeas  
 5 proceeding. Ground 4 is dismissed for the same reason. Grounds 2.2, 2.3, 2.4, 2.6, 2.7,  
 6 2.8, 3.1, and 3.2 are unexhausted. In addition, portions of Ground 2.1 are unexhausted as  
 7 described above.

8           It is further ordered that, with respect to the unexhausted claims, Petitioner has 30  
 9 days to either: (1) inform this Court in a sworn declaration that he wishes to formally and  
 10 forever abandon the unexhausted claims and proceed on his remaining claims; or (2)  
 11 inform this Court in a sworn declaration that he wishes to dismiss his petition without  
 12 prejudice in order to return to state court to exhaust his unexhausted claims;<sup>3</sup> or (3) file a  
 13 motion for a stay and abeyance, asking this Court to hold his exhausted claims in  
 14 abeyance while he returns to state court to exhaust his unexhausted claims. If Petitioner  
 15 chooses to file a motion for a stay and abeyance, or seek other appropriate relief,  
 16 Respondents may respond to such motion as provided in Local Rule 7-2.

17           It is further ordered that if Petitioner elects to abandon his unexhausted grounds,  
 18 Respondents shall have 60 days from the date Petitioner serves his declaration of  
 19 abandonment in which to file an answer to Petitioner's remaining grounds for relief.

20           It is further ordered that Petitioner shall have 60 days following service of  
 21 Respondents' answer within which to file a reply.

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27           <sup>3</sup>In offering this option, the Court makes no assurances as to whether any future  
 28 petition filed in this Court would be timely under 28 U.S.C. § 2244(d). The pendency of  
 this proceeding has not tolled the statutory filing period. See *Duncan v. Walker*, 533 U.S. 167 (2001).

1 It is further ordered that pending motions for extension of time (ECF Nos. 9, 16) are  
2 granted *nunc pro tunc* as of their respective filing dates.

3 DATED THIS 18<sup>th</sup> day of June 2020.

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MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE